NO. 47460-3

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DEBRA KOSHELNIK and GLEN TURNER individually and the marital community consisting thereof, and Estate of Evelyn Koshelnik, through Debra Koshelnik Personal Administrator,

Appellants,

v.

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES, SUSAN N. DREYFUS, Secretary of Social and Health Services, LINDA ROLFE, Director, Division of Developmental Disabilities of DSHS, CONNIE WASMUNDT, EVELYN CANTRELL, LOREN JUHNKE, and BARBARA UEHARA, employees of DSHS and unknown Supervisors,

Respondents.

RESPONDENTS' BRIEF

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I. INTRODUCTION

Chapter 74.34 RCW provides the statutory framework in this State for the protection of vulnerable adults. RCW 74.34.005 in part provides:

> (1) Some adults are vulnerable and may be subjected to abuse, neglect, financial exploitation, or abandonment by a family member, care provider, or other person who has a relationship with the vulnerable adult;
>
> (2) A vulnerable adult may be home bound or otherwise unable to represent himself or herself in court or to retain legal counsel in order to obtain the relief available under this chapter or other protections offered through the courts;
>
> (4) A vulnerable adult may have health problems that place him or her in a dependent position.

Pursuant to RCW 74.34.063 and 067, Adult Protective Services ("APS") has the duty to investigate and act upon reports of the possible abuse of vulnerable results.

In accordance with these duties, APS investigated two separate incidents of alleged abuse of a vulnerable adults occurring in the household of Debra Koshelnik and Glen Turner. One incident occurred in 2007, involving a complaint that Debra Koshelnik had hit her 18-year-old developmentally disabled, daughter with Down Syndrome.

The investigation led to a substantiated finding of abuse by APS. During the investigation, but before a determination that abuse had occurred, the Division of Developmental Disabilities ("DDD"), a separate division of the Department of Social and Health Services ("DSHS"), terminated the care contract Ms. Koshelnik.

Ms. Koshelnik contended that the incident, while admittedly involving a striking of her daughter, did not rise to the level of abuse. She prevailed in the proceedings involving her DDD contract, and later in the APS appeal proceedings. She protested having to "go through" separate processes with DDD and with APS, notwithstanding that each had a different purpose and their conclusion in her favor. These administrative proceedings terminated in mid-2008, with no further review sought by APS or DDD.

A year-and-a-half later, a separate event occurred. A family member made a report to APS that Debra Koshelnik was possibly mistreating their deaf 85-year-old mother, Mrs. Evelyn Koshelnik, who was residing with Debra. An APS investigator, Loren Juhnke, was assigned to investigate the report. On January 4, 2010, he went to the home with an American Sign Language ("ASL") interpreter, and interviewed Evelyn Koshelnik. The interview was without incident, and it

was apparent that the report of possible "elder abuse" was groundless. He and the interpreter departed the Koshelnik home.

Shortly thereafter, the elder Mrs. Koshelnik collapsed, and was taken to the hospital, where she was pronounced dead of an apparent stroke. It is apparently this incident which precipitated this lawsuit.

In June of 2011, this lawsuit was brought by Debra Koshelnik and husband Glen Turner on their own behalf, and by Debra Koshelnik as the personal representative of the Estate of Evelyn Koshelnik against DSHS and individual named employees. They claimed that the APS investigator, "an imposing man," had "literally terrified Evelyn Koshelnik to death." They claimed that in pursuing the earlier administrative proceedings in 2007 and 2008, taken together with the death of Evelyn Koshelnik, DSHS and various named individual State employees, had pursued a "conspiracy" to destroy their family, and that they were guilty of wrongful death, outrage, defamation, and violation of their federal civil rights.

It is the position of the State of Washington, through its departments and agencies, DSHS and APS, and the individual employees of those agencies which have been sued, that they properly discharged their statutory obligations to protect these vulnerable adults, and that it was proper to pursue lawful administrative processes to do so, affording not only the plaintiffs their full panoply of due process rights, but to

exercise those due process rights on behalf of the vulnerable adult, as well. No tort liability under the circumstances of this case can arise from any of their actions.

The defendants/respondents, in two separate summary judgment proceedings, challenged the ability of the plaintiffs to create any issue of material fact which would establish the legal elements of any of their claims. The plaintiffs utterly failed to do so, and their suit was dismissed. They in turn have failed to do so on appeal, and the orders of the trial court dismissing the case should be affirmed.

II. STATEMENT OF THE CASE

A. Statement of Facts

In February of 2007, a report was made to APS that Olympia resident plaintiff/appellant Debra Koshelnik had hit her adopted daughter, "G", an 18-year-old developmentally disabled girl with Down Syndrome. The complaint had been made to her father and school personnel, who noticed that "G" was upset. When asked why she said, "mom hit me." This was repeated to other school personnel, was reported to APS, and an APS investigation ensued. CP at 93-94. "G" described to the interviewer that her mom had hit or slapped her face, and it was apparent the experience had been traumatic. She placed her fist against her face to illustrate the blow. CP at 93. A police report was duly made, and a police

officer participated with APS in the initial interview with Debra Koshelnik. CP at 93. Ms. Koshelnik admitted striking "G", but described the incident as a "light pop" rather than a "hit" or "strike" designed to make "G" stop sticking out her tongue, apparently one of her common misbehaviors. Ms. Koshelnik recognized that "hitting" "G" would be considered abuse, but contended that what she had done did not rise to that level. CP at 95-98.

The APS investigator substantiated the allegations of abuse in June of 2007 (prosecution of the incident as an assault had been declined by the Thurston County prosecutor). CP at 95. Ms. Koshelnik appealed that ruling in accordance with established administrative procedures.

One of the consequences of the pending APS investigation was that DDD terminated Ms. Koshelnik's care provider contract with regard to two other developmentally disabled family members in her care. An appeal of that decision was brought on their behalf by Ms. Koshelnik, and an administrative law judge ("ALJ") reversed the DDD action, concluding that given Ms. Koshelnik's description of the complained-of incident with "G", DDD did not have a basis to conclude that Debra Koshelnik was unable to meet the needs of the other persons in her care. CP at 88. When APS substantiated the abuse finding (as it has the authority to do—RCW 74.34.067(6)), DDD again sought termination of payment. The ALJ

held that DDD was collaterally estopped from doing so by the finding in the first DDD action. CP at 78-89, 106-33.

In the meantime, the appeal process with regard to the APS finding continued. Hearings were held in January of 2008. The ALJ in that separate proceeding in March of 2008 reversed the APS finding of substantiated abuse. CP at 92-102. APS sought review of this determination, and in August of 2008 the review ALJ upheld the reversal of the APS finding. CP at 137-73. APS did not seek further review, and there the matter ended.

About a year-and-a-half later, on January 4, 2010, on an entirely separate matter, Loren Juhnke, an employee of APS, went to the home of the plaintiffs, Debra Koshelnik and Glen Turner, in Olympia, Washington, to interview Evelyn Koshelnik. Evelyn Koshelnik was Debra Koshelnik's mother, and she was a resident at Debra's home. CP at 258-68.

The reason for this APS visit was that another daughter of Evelyn Koshelnik, a sister of Debra, who lived in Eastern Washington, had made a report to APS of possible mental abuse or mistreatment of Evelyn Koshelnik in Debra's house. The house was described by the sister as "filthy," a "hoarder house," and that Evelyn's movements and contacts were tightly controlled by Debra, to the extent that other family

members could not adequately determine her welfare, about which they were accordingly concerned. CP at 258-68.

At that time, Evelyn Koshelnik was 85 years old. She was deaf, and had been deaf all of her life. Accordingly, Mr. Juhnke arranged to be accompanied to the interview by a certified ASL interpreter. She clearly met the definition of a vulnerable adult. CP at 258-68.

Mr. Juhnke contacted Debra at the house, explained his purpose, and she was cooperative. He conducted the interview with Evelyn Koshelnik in Evelyn's bedroom, in the presence of the ASL interpreter. The interview was uneventful. Evelyn Koshelnik's room was clean and in good order. She was happy with her situation, happy with her family, and the only concerns she expressed were for the welfare of her daughter, Debra, who worked hard and had many responsibilities. CP at 258-68.

Mr. Juhnke observed the Koshelnik house to be clean and orderly. None of the reported possible mistreatment was borne out by this investigation, and he concluded that there were no issues of concern. He and the ASL interpreter left the premises. No evidence whatever exists that Mr. Juhnke's conduct of the interview with Evelyn Koshelnik was other than totally appropriate, respectful, and professional, or motivated by

anything but the sister's report. He was, as indicated, accompanied by the ASL interpreter throughout the interview.

Within a short period after the departure of Mr. Juhnke and the interpreter, Evelyn Koshelnik displayed agitation to Debra, and then collapsed. She was taken to the hospital, where at some point she was pronounced dead of a cerebral hemorrhage. Mr. Juhnke was advised the next day by the coroner that this had happened. He documented his visit, and his conclusions that the report of possible mistreatment of Evelyn Koshelnik was unsubstantiated. CP at 258-68.

Another year-and-a-half thereafter, in June 2011, Plaintiffs commenced this lawsuit. Debra Koshelnik brought it in her own name, and as personal representative of the Estate of Evelyn Koshelnik.[1] CP at 6-25. The suit alleged a claim for wrongful death of Evelyn Koshelnik, and asserted that Loren Juhnke had, by his "presence and the nature of his questioning literally terrified Mrs. Koshelnik to death." CP at 18. The complaint further alleged, in 17 pages of heavily rhetorical and argumentative assertions, that this act was the culmination of a concerted effort by DSHS and several individually named persons to

[1] Because Debra Koshelnik and Evelyn Koshelnik shared the same last name, and because many of the events claimed by Plaintiffs in this case primarily involved Debra Koshelnik, she will sometimes be referred to herein as Debra, or singly as Debra Koshelnik, notwithstanding that Glen Turner, her husband, is also a plaintiff, purely for convenience and without disrespect to any party. The parties will also be referred to as Plaintiffs or Appellants as appropriate.

"destroy the Koshelnik family," going back to events in 2007 and 2008, when APS and DDD had investigated an allegation of abuse by Debra Koshelnik of her then 18-year-old developmentally delayed daughter, who suffered from Down Syndrome, as described above. CP at 6-25.

Plaintiffs alleged "conspiracy," defamation, wrongful death, outrage, and violation of federal civil rights. CP at 6-25.

All of Plaintiffs' claims were dismissed on summary judgment. In summary, the dismissals were based upon the lack of violation of any tort duty by Mr. Juhnke, and a failure to establish the existence of a material issue of fact as to each element of the plaintiffs' other claims, including the elements of federal civil rights claims against each individual defendant. These will be discussed in detail in this brief.

B. Procedural History

After the filing of the lawsuit in June of 2011, the parties exchanged documentary discovery. However, no depositions were ever taken in the case. In particular, the plaintiffs never at any time sought to depose Mr. Juhnke or the ASL interpreter (the only persons present with Evelyn Koshelnik at her interview), notwithstanding their purely argumentative assertions that he had engaged in "outrageous" conduct or had improper motives; bare allegations which thus, throughout the case,

never had the least factual support. Nor did they seek to depose any of the several named defendants whom they had asserted had deliberately attempted to deprive them of their federal civil rights, or any other witness. This was despite the fact that the case was pending several years before the Superior Court, essentially without action except on the defendants' part. Throughout the case Plaintiffs have rested their claims on indignant rhetoric and inflammatory argumentative assertions, with no meaningful efforts to tie these claims to any clear factual underpinnings.

The foregoing point can hardly be overstated. Plaintiffs chose to respond to the defendants' summary judgment motions by submitting a fragmentary, and often contextless, documentary record, together with Debra Koshelnik's own conclusory declaration and that of a supposed "expert." They had large amounts of time—months—to seek support for their claims through depositions of any of the involved persons before the motions were heard. They deliberately chose not to do so—even though they were claiming that individual State employees had acted with deliberate and intentionally improper motives and purposes.

In July of 2013, Defendants brought a combined 12(b)(6) motion to dismiss and CR 56 summary judgment motion, directed only to the wrongful death and other claims brought by the Estate of Evelyn Koshelnik. (Plaintiff filed declarations, so the matter was heard as

a summary judgment motion.) CP at 33-66. This motion was granted, and the motion to reconsider it was denied. CP at 327.

As a result, all of the claims of the Estate of Evelyn Koshelnik were dismissed, but the other claims remained in the case at that time. Plaintiff filed a notice of appeal of that dismissal to this Court, later converted to a notice of discretionary review and a motion for discretionary review. *See Koshelnik vs. DSHS,* Court of Appeals, Div. II, Case No. 45388-6-II. After briefing and argument before the Commissioner, the motion for discretionary review was denied on February 6, 2014.

In the meantime, Defendants made a motion for summary judgment to dismiss all of the remaining claims, in August of 2013. CP at 312-26. Plaintiffs filed their response. CP at 328-45. The hearing was stricken pending the outcome of the motion for discretionary review. After the denial of review, the defendants, several months later, filed their reply regarding the motion to dismiss the remaining claims (CP at 346-53), and the motion was heard on March 27, 2015 (Verbatim Report of Proceedings, March 27, 2015 Hearing ("March 2015 RP")). The motion was granted and the order dismissing the remainder of the case was entered on that date. CP at 354-55.

This appeal of the orders of dismissal ensued. CP 356-62.[2]

III. ARGUMENT

A. Introduction

Defendants/Respondents will in this brief generally follow the order in which matters were decided in the Superior Court, beginning with the motion to dismiss the claims of the Estate, followed by the motion to dismiss the remaining claims. In so doing, Defendants will set out their arguments in support of the orders entered below. Arguments of the plaintiffs/appellants not specifically addressed in that connection will be separately addressed thereafter.

Both orders of dismissal were entered as summary judgments. Of course, summary judgments are not to be granted where there are genuine issues of material fact. *Kofmehl v. Baseline Lake, LLC*, 177 Wn.2d 584, 594, 305 P.3d 230 (2013) (en banc). As the discussion below will show, Plaintiffs failed to raise such genuine issues of fact.

The State submitted both motions below under the familiar rule of *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989), and *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548,

[2] It is noteworthy that the plaintiffs/appellants do not assign error to the orders of the trial court from which they appeal. In addition, the order granting Defendants' motion to dismiss/motion for summary judgment of the claims of the Estate, dated July 12, 2013, does not appear to have been separately provided in the record. A copy is attached to the notice of appeal. CP at 358-59. The "assignments of error" they *do* make bear no relation to any appealable action of the trial court.

91 L. Ed. 2d 265 (1986), which provide that a defendant moving for summary judgment can point out, with or without declarations, that there is an absence of evidence to support the plaintiffs' case. At that point, the burden shifts to the plaintiffs, the parties with the burden of proof at trial, to demonstrate an issue of fact as to every material element of their case. If they cannot do so, summary judgment must be granted.

A ***defendant*** may make a summary judgment without declarations, pointing out the lack of a case under substantive law. Thereafter, to defeat summary judgment, a nonmoving plaintiff must come forward with specific, admissible evidence to sufficiently rebut the moving party's contentions and support all necessary elements of the asserted claims. *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997).

In this case, the State challenged the ability of the Estate and the individual plaintiffs to come forward with any material evidence in support of their claims against the State and the named defendants.

The moving party bears the initial burden of showing the absence of an issue of material fact. *Young*, 112 Wn.2d at 225 (citing *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975)). A moving defendant may meet this initial burden by pointing out to the court that there is an absence of evidence to support the plaintiff's case. *Id.*

Where if the moving party is a defendant and makes this initial showing, then the inquiry shifts to the party with the burden of proof at trial, the plaintiff. If, at this point, the plaintiff "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," then the trial court should grant the motion. *Celotex*, 477 U.S. at 322; *see also T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630-32 (9th Cir. 1987). In *Celotex*, the United States Supreme Court explained this result:

> In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an initial element of the non-moving party's case necessarily renders all other facts immaterial.

Celotex, 477 U.S. at 322-23 (quoting CR 56).

Young v. Key Pharmaceuticals expressly adopted the *Celotex* reasoning and procedure. *Young*, 112 Wn.2d at 225-26. CR 56(e) states that the response, "by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."

Accordingly, in this case, to defeat summary judgment, the Estate of Evelyn Koshelnik, and Debra Koshelnik and Glen Turner, had the burden of establishing by admissible evidence that there is a material issue of fact as to every element of their claims. They could not do so, and summary judgment was properly granted to Defendants.

B. The Claims of the Estate of Evelyn Koshelnik Were Properly Dismissed

With respect to the claims of the Estate of Evelyn Koshelnik, a review of Plaintiffs' brief on appeal, and all of their briefing below, shows that they were based entirely upon the fact that Loren Juhnke was a "big, imposing man," and that it should constitute actionable negligence on the part of DSHS to send "such a man" to conduct an APS interview of an elderly deaf woman.[3] This claim is meritless on its face, and meritless under the law, as will be discussed below. First, however, it is important to note that the plaintiffs never even attempted to show that Mr. Juhnke conducted the interview in anything other than a professional and straightforward manner and with appropriate demeanor. In short, despite the fact that they alleged the tort of outrage and deprivation of civil rights against Mr. Juhnke, they never adduced anything supporting this unwarranted allegation.

"Outrage" is, of course, an actionable tort. "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress." *Lewis v. Bell*, 45 Wn. App. 192, 194, 724 P.2d 425 (1986). To establish a claim for the tort of outrage, a plaintiff must demonstrate

[3] They also contend that he must have developed an improper motive from reviewing "earlier records"—an utter speculation. *See* Br. of Appellants at 13.

that: (1) he or she suffered severe emotional distress; (2) the emotional distress was inflicted intentionally or recklessly, and not negligently; (3) the conduct complained of was outrageous and extreme; and (4) he or she personally was the object of the outrageous conduct. *Chambers-Castanes v. King Cty.*, 100 Wn.2d 275, 288, 669 P.2d 451 (1983) (en banc).

The defendant's conduct must be " 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.' " *Reid v. Pierce Cty.*, 136 Wn.2d 195, 202, 961 P.2d 333 (1998) (en banc) (quoting *Grimsby v. Samson*, 85 Wn.2d 52, 59-60, 530 P.3d 291 (1975) (en banc); Restatement (Second) of Torts § 46 (1965)).

In the instant case, the plaintiffs did not even attempt to establish anything that would create an actionable issue of fact as to any of these elements.

There were only two potential claims for the death of Mrs. Koshelnik—intentional conduct (outrage), and a claim sounding in negligence, if one exists. The former the plaintiffs could not support, nor did they try; as to the latter, no such claim exists.

Because it is not ordinarily a tort for somebody to have a conversation with another person, the plaintiffs needed a theory, and the

one they set forth is "negligent investigation" by APS and Mr. Juhnke. *See* Br. of Appellants at 38; CP at 6-25. The insurmountable problem Plaintiffs face, however, is that Washington courts have repeatedly and decisively held that, with the sole exception of placement decisions under the child welfare statutes (RCW 26.44), there is no cause of action in this state for "negligent investigation" against public agencies.

This rule was recently forcefully restated in *Janaszak v. State*, 173 Wn. App. 703, 297 P.3d 723 (Div. I 2013). *Janaszak* involved the investigation of a dentist under the Uniform Disciplinary Act. The court stated as follows:

> Janaszak maintains that the respondents can be held liable for negligent investigation because the UDA creates a statutory duty to investigate complaints against health care providers. In general, Washington common law does not recognize a claim for negligent investigation because of the potential chilling effect such claims would have on investigations. We have refused to recognize a cognizable claim for negligent investigation against law enforcement officials and other investigators.
>
> Janaszak argues that *Lesley v. Department of Social & Health Services* [83 Wash.App. 263, 273, 921 P.2d 1066 (1996)]. and *Corbally v. Kennewick School District* [94 Wash.App. 736, 740, 973 P.2d 1074 (1999)] create such a cause of action. We disagree. The *Lesley* court narrowly limited its holding to create a negligent investigation claim only against the Department of Social and Health Services (DSHS) caseworkers investigating child abuse pursuant to their specific statutory duty to investigate. In *Corbally*, as here, the plaintiff attempted to extend *Lesley*, arguing that a negligent investigation claim should be permitted any time a statutory duty to investigate exists. Janaszak

> mischaracterizes *Corbally's* holding to say that the court recognized an exception for all cases where an agency has a statutory duty to investigate. It does not. While *Lesley* carved out an exception for DSHS caseworkers, *Corbally* expressly refused to extend that exception any further. Our courts have created no further exceptions to the general rule that we do not recognize claims for negligent investigation. We decline to do so here.

Janaszak, 173 Wn. App. at 725 (footnotes omitted).

There is therefore, quite simply, no tort of negligent investigation in Washington, other than those involving child abuse investigations and attendant placement decisions pursuant to RCW 26.44. Thus Plaintiffs' claims that APS or Mr. Juhnke were "negligent" in their investigation, or that DSHS negligently failed to have "policies" or "training" in place concerning whether or not "big men" should conduct APS investigations involving the elderly deaf are, as a matter of law, unavailing.

Moreover, even if there existed such a cause of action, it is further clear under Washington law that there is no duty in negligence for claimed harm in the manner of conducting such an investigation. *M.W. v. DSHS*, 149 Wn.2d 589, 70 P.3d 954 (2003) (en banc).

M.W. v. DSHS was a case in which the plaintiffs claimed that, in carrying out a child-abuse investigation, DSHS caseworkers acted improperly by inappropriate touching of the subject infant's genitalia. They brought claims of negligent investigation, civil rights violations, and assault against DSHS. All claims were dismissed on summary judgment.

The plaintiffs appealed the dismissal of the negligent investigation claims, and the Court of Appeals, Division II reversed. However, on discretionary review, the Supreme Court reversed the Court of Appeals and reinstated the original dismissal. The Supreme Court stated as follows:

> The issue before us is whether these statutory concerns also support a broader duty to protect children from harm that is the result of direct negligence by DSHS investigations during the course of an investigation, such as dropping a child or negligently inflicting emotional harm of the kind J.C.W. alleges. A careful reading of the statute's statement of purpose gives no indication that when the legislature created the duty to investigate child abuse, it contemplated protecting children from all physical or emotional injuries that may come to them directly from the negligence of DSHS investigators. Because the cause of action of negligent investigation originates from the statute, it is necessarily limited to remedying the injuries the statute was meant to address.

M.W., 149 Wn.2d at 598.

In this case, DSHS/APS has statutory duties to investigate allegations of the possible abuse of vulnerable adults. Chapter 74.34 RCW. Assuming that it had actionable duties in such an investigation regarding "placement" or "removal," by analogy to those created in Child Protective Services ("CPS") by the child welfare statutes (which it does not), clearly, under the rationale of *M.W. v. DSHS*, such duties would not extend to negligently-inflicted physical or emotional harm from the way in

which the investigation was undertaken.[4] Thus the claim that sending a "big, imposing man" to conduct a vulnerable-adult interview caused emotional distress with consequent stroke is not supportable under Washington law, under any theory whatever.

The "negligent training" and "negligent supervision" claims likewise fail. There is not a single case cited by the plaintiffs in support of such claims; because "training" and "supervision" are for "investigation," they are necessarily subsumed within the concept of "negligent investigation," i.e., training for what? Supervision of what? Investigation, necessarily.

In the context of their claims of negligent investigation, training, and supervision, the plaintiffs repeatedly refer to the declaration of their "expert," Allie Joiner. *See*, for example, Br. of Appellants at 41-43. It is a sufficient answer to this that Ms. Joiner's testimony is wholly immaterial: no witness, expert or otherwise, can by their opinions create an actionable duty. It is axiomatic that the existence of a legal duty is always purely a question of law for the court. *Crowe v. Gaston,* 134 Wn.2d 509, 951 P.2d 1118 (1998); *McKown v. Simon Prop. Grp., Inc.*, 182 Wn.2d 752, 344 P.3d 661 (2015).

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[4] There can be no real analogy in any event between APS and CPS investigations, the most obvious reason being that competent adults, unlike children, can live where and how they want to. *See* RCW 74.34.067(6). The plaintiffs in any event have never contended otherwise in this action.

Moreover, though it is certainly a subsidiary issue, there is, as a matter of law, no causation present. Plaintiffs argue, with citations to Sherlock Holmes, that extreme emotion can produce apoplexy, or stroke. But, even if this might be the case in certain situations, including literary ones, it does not answer any causation question in a particular case. It is also the common experience of humankind that stroke occurs, particularly among the elderly, in the complete absence of emotional stimulus. The cause of stroke is presumably a condition within the body of the person affected, and to suggest that causation concerning a medical condition could be considered, in the absence of direct trauma, without medical testimony, would allow lay determination of the causes of medical conditions. Plaintiffs' analogy of a gunshot to the head is insubstantial, if not frivolous.

There is a more overriding reason, however, that causation is not present—there is no tort. Legal analysis of causation of this sort, i.e., of conditions of the human body, does not even arise in the absence of the initial showing of tortious conduct. In this case, a conversation took place. The conversation was not a tortious act. The fact that a stroke took place after such a conversation, even if the person who suffered it was emotionally agitated, raises no issue of legal causation, because it raises

no issue at all. Legal analysis of causation in a tort case can only arise after the determination of duty and breach.

If a lawyer interviews an elderly witness, and the witness suffers a stroke shortly afterwards, can it be said that the lawyer caused the stroke? If a police officer issues a citation to an elderly citizen, an event which is followed by a stroke, is there "causation"? These examples could be multiplied indefinitely, and the answer will always be, no. That a particular individual may have a certain physiological response (a medical matter in any event) to a non-tortious encounter creates no issue at all of legal causation—which is what the issue would be.

C. The Defamation Claims Were Properly Dismissed

Plaintiffs allege that DSHS employees spread "defamatory information within DSHS." CP at 14. They did not state specifically in the complaint what the "defamatory information" was, and, as noted, they claimed that, it was disseminated "within DSHS," not to outsiders or third parties. Eventually, Plaintiffs' position appeared to be that documents within DSHS stating that Debra Koshelnik had allegations of abuse "confirmed" constituted the "defamation." Br. of Appellants at 36.

To make a prima facie case of defamation, a plaintiff must prove "falsity, an unprivileged communication, fault, and damages." *Robel v. Roundup Corp.*, 148 Wn.2d 35, 55, 59 P.3d 611 (2002);

see also LaMon v. Butler, 112 Wn.2d 193, 197, 770 P.2d 1027 (1989); *Guntheroth v. Rodaway*, 107 Wn.2d 170, 175, 727 P.2d 982 (1986); *Mark v. Seattle Times*, 96 Wn.2d 473, 486, 635 P.2d 1081 (1981), *cert. denied*, 457 U.S. 1124, 102 S. Ct. 2942, 73 L. Ed. 2d 1339 (1982).

Ultimately, the plaintiffs conceded that the dissemination of the allegedly defamatory material was "internal," i.e., not published to outside sources. *See* March 2015 RP at 25-26. This allegation itself negates the element of "publication," i.e., unprivileged communication. Dissemination "within DSHS" affirmatively establishes the "common interest" privilege, which provides that otherwise defamatory statements are not actionably "published" where they are made in the course of employment to co-employees and others within an organization. *Pate v. Tyee Motor Inn, Inc.*, 77 Wn.2d 819, 820-21, 467 P.2d 301 (1970); *Richland Sch. Dist. v. Mabton Sch. Dist.*, 111 Wn. App. 377, 390, 45 P.3d 580 (2002); *Moe v. Wise*, 97 Wn. App. 950, 957, 989 P.2d 1148 (Div. 2 1999).

Moreover, with regard to State agencies, there is an absolute privilege, the "official duty privilege," which provides that otherwise defamatory material is shielded from liability where disseminated by officials. *Williams v. Virginia Mason Med. Ctr.*, 75 Wn. App. 582, 586, 880 P.2d 539 (Div. 1 1994).

An examination of the materials contended to be "defamatory" by Plaintiffs involved matters of opinion, official duty, and were communicated only "in-house" within DSHS in direct conjunction with employee duties. This was not the situation in *Doe v. Gonzaga Univ.*, 143 Wn.2d 687, 701-3, 24 P.3d 390 (2001), cited by the Plaintiffs, where the defamatory material in question related to matters outside the scope of the ordinary work of the person claimed to have uttered the defamatory material. *See also Gonzaga Univ. v. Doe*, 536 U.S. 273, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002).

D. Plaintiffs' Civil Rights Claims Were Properly Dismissed

An analysis of the claims of Debra Koshelnik and her husband for deprivation of constitutional rights under 42 U.S.C. § 1983 is helped by an understanding of the gravamen of Plaintiffs' claims, overall. Ultimately, they are based upon the assertion that State of Washington required them to defend the same conduct—the claim of abuse by Debra in hitting her developmentally disabled 18-year-old daughter—in two separate administrative contexts. They freely concede that the allegations of the daughter, that "mom hit me" (reported to several people, including school officials and the police) had to be investigated, and that the bringing of the first proceeding, by the DDD during the pendency of the APS investigation, was proper. March 2015 RP at 13-14. They agree that they

received the full panoply of due process rights, and, indeed, that they prevailed in the proceeding.[5] They object to the second related DDD proceeding initiated after APS "substantiated" the abuse, which was resolved by summary judgment before the first hearing ALJ. But, they make no showing whatever that APS lacked the authority after the initial DDD proceeding, to make its determination that abuse had occurred. The DDD home care payment questions are separate from the APS proceedings. *See* WAC 388-825-375, 380.

Moreover, Plaintiffs acknowledged that in the subsequent APS proceeding, in which they appealed the conclusion of APS that abuse was substantiated, they also received the full array of procedural due process rights. March 2015 RP at 15-17. Their claim was that the necessity of more than one proceeding constituted a "substantive due process" violation. March 2015 RP at 15-17. However, they submitted no authority for the proposition that the two separate DSHS divisions, with separate responsibilities, could not lawfully proceed in this manner—and they have never done so. They specifically ignore the fact that under

[5] A review of the ALJ findings and conclusions in the proceedings shows that Debra never denied striking her daughter, and that such could be considered abuse, except that she contended that it was a "mild pop" designed to get her to quit sticking out her tongue. While both hearings upheld Debra's defense, both involved considerable analysis as to the nature of the blow—her explanation was by no means obvious, whatever the conclusions of the hearing officers.

RCW 74.34.067(6), APS has the authority to make a determination that abuse of a vulnerable adult has occurred. *See also* RCW 74.34.068.

At all stages of these proceedings, the plaintiffs failed completely to create an issue of fact as to any element of a federal civil rights claim. They could not show a constitutional deprivation. Of the greatest importance, they never demonstrated any connection between the action of any individual defendant and any such deprivation. Indeed, the trial court, recognizing this, closely questioned Plaintiffs' counsel at the summary judgment hearing on this vital point, and they were wholly unable to explain or delineate any such connection. March 2015 RP at 19-25. This failure, of course, meant also that they were unable even to address the claims of qualified immunity under federal law on the part of the individual defendants, an analysis which takes place only after a showing of constitutional deprivation by an individual actor.

Plaintiffs based their 42 U.S.C. § 1983 claims on a denial of due process with respect to liberty interests in "family association" and purported property interests in regard to receipt of caretaker funds. These claims fail for these principal reasons: plaintiffs were provided due process at all times, no individual defendant acted intentionally and deliberately to deny any constitutional right, there can be no vicarious liability in § 1983 actions, and the individual defendants as a matter of law

have qualified immunity. Specifically, Ms. Koshelnik has been unable to identify any violation of the statutes governing APS investigations and proceedings on the part of anyone.

In view of the ambiguous nature of the plaintiffs' allegations with regard to their civil rights claims, it is useful to set out the basic precepts governing such claims, followed by an analysis of the plaintiffs' claims against the individual named defendants in this case. This will demonstrate the complete failure, as a matter of law, of their federal civil rights claims.

1. No Liability for Official Acts

Neither the State of Washington, its agencies, nor their officials or employees acting in their official capacities are subject to suit under 42 U.S.C. § 1983. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989); *Hafer v. Melo*, 502 U.S. 21, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991); *Callahan v. City of Philadelphia*, 207 F.3d 668, 669-70 (3rd Cir. 2000). Following the federal cases, the Washington State Supreme Court has also ruled that the State, its agencies, and employees in their official capacities, are not subject to suit under 42 U.S.C. § 1983. *Rains v. State*, 100 Wn.2d 660, 667, 674 P.2d 165 (1983); *Edgar v. State*, 92 Wn.2d 217, 221, 595 P.2d 534 (1979)

(waiver of sovereign immunity did not subject state to suit under 42 U.S.C. § 1983).

2. No Vicarious Liability Under § 1983

There can be no "Section 1983" liability based upon any principles of vicarious liability or respondeat superior. A defendant to be subject to suit under § 1983 must have personally participated in and caused the alleged deprivation of federal constitutional rights. *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). This inquiry into causation must be individualized and focus on the duties and responsibilities of each individual defendant whose acts or omissions are alleged to have caused a constitutional deprivation. *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988). Plaintiff must show that the individual defendant performed an affirmative act, participated in another's affirmative act, or omitted to perform an act which he was legally required to do that caused the deprivation of which he complains, or that defendant set in motion a series of acts by others which he knew or reasonably should have known would cause others to inflict the constitutional injury. *Johnson v. Duffy*, 588 F.2d 740, 743-44 (9th Cir. 1978). Even where a defendant has the authority to control the offending subordinate, it must be demonstrated that the defendant implicitly authorized, approved, or knowingly acquiesced in the unconstitutional

conduct of the offending subordinate. *Bellamy v. Bradley*, 729 F.2d 416, 421 (6th Cir. 1984).

3. Only Deliberate Misconduct Can Support § 1983 Liability

Negligence claims do not constitute the deprivation of a federal constitutional right under § 1983. Only claims of deliberate misconduct or deliberate indifference are actionable. *E.g.*, *Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986); *Davidson v. Cannon*, 474 U.S. 344, 106 S. Ct. 668, 88 L. Ed. 2d 677 (1986). Even gross negligence does not amount to a constitutional violation. *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976); *Wood v. Housewright*, 900 F.2d 1332, 1334 (9th Cir. 1990). This is a very high standard. It equates to criminal mens rea for recklessness. *Farmer v. Brennan*, 511 U.S. 825, 839-40, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994).

In short, to even rise to the level of a § 1983 claim (and entirely apart from immunity defenses thereto, as discussed below), Plaintiffs must establish that there are issues of fact that demonstrate jury questions on the issue of intentional deprivation of civil rights by specifically named individual defendants, rather than conduct which is negligent or "grossly negligent."

4. Defendants Have Qualified Immunity Against the § 1983 Claims

The individual defendants here have qualified immunity against Plaintiffs' 42 U.S.C. § 1983 claims. State employees are entitled to qualified immunity, which is held to extend to all but the "clearly incompetent" officials who violate clearly established law that a reasonable official would have known about. *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982); *Malley v. Briggs*, 475 U.S. 335, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986); *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987); *Hunter v. Bryant*, 502 U.S. 224, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991); *Elder v. Holloway*, 510 U.S. 510, 114 S. Ct. 1019, 127 L. Ed. 2d 344 (1994). Qualified immunity is intended to give officials flexibility to act in areas where the law is unclear without having their judgments being clouded by fears of being sued. *Anderson*, 483 U.S. at 645, 107 S. Ct. at 3042. Mistaken judgments and "ample room for reasonable error" are permitted under this standard as qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law. . . . [I]f officers of reasonable competence could disagree on [the relevant] issue, immunity should be recognized." *Malley*, 475 U.S. at 341, 106 S. Ct. at 1096.

There are two steps to the qualified immunity inquiry. First, a plaintiff must show that the challenged conduct clearly caused a deprivation of a federal right. *Schmitt v Langenour*, 162 Wn. App. 397, 256 P.3d 1235 (Div. 2 2011). If this showing is made, then the plaintiff next must show that the right was clearly established in a particularized way at the time the challenged conduct occurred. This second step asks "whether the defendant could . . . have reasonably but erroneously believed that his or her conduct did not violate the plaintiff's rights." *Devereaux v. Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001). This second inquiry into whether the allegedly deprived right was "clearly established" requires a court to decide "whether the contours of the right were already delineated with sufficient clarity to make a reasonable person in the defendant's circumstances aware that what he was doing violated that right." *Devereaux*, 263 F.3d at 1074.

A plaintiff must establish more than broad legal truisms. *Anderson*, 483 U.S. at 639-40. It is not enough that the emergence of the right could be predicted from cases dealing with analogous issues, or that the right lay in the line of natural evolution from accepted principles, or that stated with sufficient generality, the right could be said to exist already. *Devereaux*, 263 F.3d at 1074.

5. Plaintiff Fails to Establish a 42 U.S.C. § 1983 Claim Against Any Individual Defendant

The defendants, following the format used by Plaintiffs/Appellants at pages 19-22 of their brief will address the claims against each individual defendant. Remarkably, although the federal civil rights claims are the heart of her case, Ms. Koshelnik devotes barely three pages of a 49-page brief, in an extremely half-hearted attempt, to identifying any civil rights violation.

a. Barbara Uhera

Ms. Koshelnik asserts that Ms. Uhera prior to "the events of 2007" was "cordial and professional" to her and her family. She then complains of opinion testimony given by Ms. Uhera as a witness in the administrative proceedings, which seemed to indicate lack of cordiality. Plaintiffs also ignore Ms. Uhera's testimonial immunity. RCW 74.34.050. Plaintiffs then make reference to an email from a department employee, Dee Couch, raising the question of whether or not the family "was getting too much support" and whether or not DDD could "*legally* reduce that support." *See* Br. of Appellants at 19 (emphasis added). While Plaintiffs complain of this email at several junctures in their brief, and assert that it is significant as supposed departmental "motive," as they did before the trial court, they ignore the fact that Dee Couch was never sued by them in

this action—she is not one of the individual defendants. *See* March 2015 RP at 17-22.

The plaintiffs then simply make totally conclusory assertions that because of this email (as to which no context whatever is provided and which contains no improper matter whatever), Ms. Uhera "agreed to use the assessment process" to an improper end. But, they never identify any unlawful conduct or any improper end which was achieved, much less one which rises to a denial of federal constitutional rights, nor do they identify any deprivation thereof.

And, as is the case with every individually named defendant, they fail utterly to show why qualified immunity would not apply—in other words, they do not, cannot, and, indeed never tried to show that Barbara Uhera deliberately violated a clearly established constitutional right.

b. Linda Rolfe

Linda Rolfe was the DDD director. Ms. Koshelnik asserts that "she was the division head charged with overall management" of Ms. Uhera and others, and she "took no action." *See* Br. of Appellants at 20-21. That is the entire claim! And yet, as detailed above, there is no vicarious or derivative individual liability under 42 U.S.C. § 1983. Plaintiffs, for all intents and purposes, concede that no specific intentional

action to deprive Plaintiffs of their civil rights can be ascribed to Ms. Rolfe.

c. Evelyn Cantrell

Evelyn Cantrell the attorney who presented the APS's case in the administrative hearing arising out of the APS findings of substantiated abuse. The Koshelniks' entire "case" against Ms. Cantrell, is predicated upon a simple citation to the record of the APS administrative hearings, and the characterization of her arguments therein as "frivolous" by the plaintiffs—nothing more. *See* Br. of Appellants at 21.

Further comment on this assertion is called for. It is characteristic of this entire lawsuit, before the Superior Court and on appeal, that the plaintiffs/appellants make sweeping, indignant assertions of wrongful and illegal conduct against the State and individuals whom they have sued, which, when examined, show no more than a disagreement between the Koshelniks and the agencies and their employees as to the legal effect to be given to an admitted act of striking a vulnerable adult—a disagreement which was resolved in Plaintiffs' favor after hearings in which they had and exercised full due process rights. The records of these hearings speak for themselves. The child "G", had indisputably told her father, school personnel, and APS investigators, that "mom hit me." She was visibly and abnormally upset during the school day in which this report was made.

At one point, she described the "hit" by placing a fist against her cheek. Debra Koshelnik readily admitted that it was appropriate for APS to undertake the investigation. The police officer who assisted with an interview, even though accepting Ms. Koshelnik's "innocent" explanation, reported the matter to the prosecutor because the incident in fact met the definition of abuse of a vulnerable adult.

There was a direct dispute between the witnesses as to the nature and force of this "hit." All parties recognized that hitting a vulnerable adult in the face, as punishment or otherwise, would be abuse under the relevant statutes. As can be seen from the recitations and findings of the administrative hearings, it was, as a very practical matter, incumbent upon Debra Koshelnik to provide evidence and explanations to overcome this. Her own actions had created the issues. These explanations were detailed, and involved an analysis of her history with special needs people, including those in her own family, her motives, and her reasoning and characterization of her own actions. The outcome was clearly no foregone conclusion, as is apparent from the decisions themselves.

While on the one hand, the plaintiffs appear to recognize, even concede this, on the other they attack DSHS for proceeding both under the DDD statutes and those pertaining to APS. But, nowhere do they ever demonstrate, by citation to either statutory or case law, that there was

anything at all improper in this, much less that it constituted a civil rights violation. Above all, they ignore the positive authority of APS to make determinations that abuse has occurred, a power governed by RCW 74.34.067-068, and make no showing that this authority is constrained by the DDD regulations.

d. Connie Wasmundt

"It was . . . her decision to reclassify the interaction, with no new evidence, from suspected abuse to substantiated abuse." Br. of Appellants at 22. This bare assertion, together with pointing out that her testimony and that of the police officer, in a hearing, differed in certain details, is the sole "argument" that she violated Plaintiffs' civil rights. All of the State's foregoing arguments equally apply.

e. Susan Dreyfus

Ms. Koshelnik lists Susan Dreyfus, then agency head of DSHS, refers to a non-existent, or at least non-specified, section of her brief, and provides no argument whatsoever.

E. "Due Process" and "Substantive Due Process" Claims

At pages 22 through 33 of Appellants' Brief, Ms. Koshelnik engages in an extended discussion of "due process" and "substantive due process." She argues that, while the DSHS agencies followed due process in general, and while she had the benefit of procedural due process at

every hearing, and, indeed, prevailed in the hearings, that DSHS was in "bad faith" in pursuing anything concerning the allegations of abuse beyond the first proceeding regarding DDD payment while the abuse finding was not yet "substantiated" by APS. She argues, therefore, that the requirement of any further hearings violated "substantive due process." She has never articulated any reason why APS authority would be limited in this way.

A number of things are fatal to these arguments. A central point is that Plaintiffs' attempt to base a 42 U.S.C. § 1983 tort claim—a federal civil rights violation claim—on a supposed violation of substantive due process. However, her claim in this regard is against the State, as opposed to the named individuals. And there can be no "Section 1983" claims against the State, as has been amply demonstrated above in this brief. This is symptomatic of Plaintiffs' entire approach, evident at the summary judgment hearing and on appeal, which is to ignore, or fail to adequately understand, the proposition that the supposed collective action of State employees cannot give rise to federal civil rights liability against the State. And the plaintiffs never demonstrate a tort action for this supposed substantive due process violation under state law.

For example, the plaintiffs/appellants cite *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 218-9, 143 P.3d 571 (2006) (en banc), for the

proposition that "[s]ubstantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures." Br. of Appellants at 29. But, *Amunrud* did not involve a tort action; it involved an appeal from an administrative commercial vehicle license revocation. The substantive due process claim there, while rejected, was vindicated by direct review of the administrative proceedings. In the instant case, the Koshelniks' position was vindicated by the administrative review processes themselves, and DSHS did not seek review of the final administrative decisions.

It is plain that the plaintiffs/appellants predicate their substantive due process tort claims on 42 U.S.C. § 1983, and they rely specifically on *Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1, 829 P.2d 765 (1992) (en banc), and *Lutheran Day Care v. Snohomish Cty.*, 119 Wn.2d 91, 829 P.2d 746 (1992) (en banc); Br. of Appellants at 29-33. But, these cases have no application to a claim against the State. They were cases against municipalities. Under 42 U.S.C. § 1983, municipalities constitute a "person" which can be sued as such for the deprivation of another's civil right under color of law. *See Sintra, Inc.*, 119 Wn.2d at 11. The rule of *Sintra* and *Lutheran Day Care* have no application whatever to the State of Washington—only named individuals can have possible exposure to

these civil rights claims. In both *Sintra* and *Lutheran Day Care*, the plaintiffs made additional tort claims, not applicable to this case. The additional substantive tort claims made by the Koshelniks—defamation, negligent investigation, outrage—have already been addressed herein. But, their tort causes of action based upon the administrative hearing process are squarely set forth as federal civil right claims—and these fail necessarily as against the State, and as against the named individuals, for lack of any genuine attempt to show individual acts intentionally designed to deprive the plaintiffs of their federal civil rights.

F. "Conspiracy"

The plaintiffs' claims of "conspiracy" are nothing more than an attempt to avoid the consequences of a complete failure to show an actionable tort based in the actions of any individual. Plaintiffs state that the gravamen of the "conspiracy" was to deprive Debra Koshelnik of money for paid services, and to interfere with her future ability to earn a living, "by wrongfully branding her an abuser." *See* Br. of Appellants at 38-39. But the abuse investigation and the APS determination of abuse were driven by the actions of Ms. Koshelnik herself, in the first instance, and that she ultimately prevailed in the administrative proceedings is immaterial to that fact. To hold otherwise would be to suggest that any DSHS investigation of allegations of abuse of vulnerable adults (or

children for that matter), would potentially be subject to tort liability simply because the accused person eventually prevailed.

As Ms. Koshelnik herself recognized, circumstances relied upon to establish a conspiracy must be inconsistent with a lawful or honest purpose, and reasonably consistent only with the existence of a conspiracy. *See* Br. of Appellants at 39.

To establish a claim for civil conspiracy, a plaintiff "must prove by clear, cogent, and convincing evidence that (1) two people combined to accomplish an unlawful purpose, or combined to accomplish a lawful purpose by unlawful means; and (2) the conspirators entered into an agreement to accomplish the conspiracy. But '[m]ere suspicion or commonality of interests is insufficient to prove a conspiracy.' " *Woody v. Stapp*, 146 Wn. App. 16, 189 P.3d 807 (Div. 3 2008) (citing *All Star Gas, Inc. v. Bechard,* 100 Wn. App. 732, 740, 998 P.2d 367 (Div. 3 2000)).

Plaintiff fails to meet any of these elements, and it is in fact difficult to conceive of any circumstances under which she could on this record, with a complete lack of any testimonial evidence whatever. And her ultimate problem is that, in failing to establish a substantive tort in the first place, allegations of "conspiracy" add nothing to the analysis.

IV. CONCLUSION

The State and its employees acted in accordance with their statutory authority to investigate an allegation of abuse of a vulnerable adult in 2007. The conduct was admitted, though its intensity and proper characterization was denied. APS followed statutory procedures in its investigation and in its determination, pursuant to its statutory authority, that abuse had occurred. That two sets of hearings ensued (including appeals), which ultimately appears to be the source of Plaintiffs' claim, was a collateral effect of DDD involvement in payment to the plaintiffs' other family members. Plaintiffs never established any violation of the relevant statutes. The Koshelniks received the full panoply of due process rights, and ultimately prevailed. Correspondingly, through the State, the vulnerable adult likewise had the benefit of this due process; a benefit to which all vulnerable citizens of this State are also entitled.

The unfortunate death of Evelyn Koshelnik some years later was a wholly unrelated event, and wholly unrelated to any improper conduct on the part of APS and its investigator. Both in respect to their claims regarding this incident, as well as the earlier matter, the plaintiffs have chosen to submit only a disjointed and limited documentary record, and deliberately chose to pursue no further discovery, notwithstanding the inflammatory argumentative assertions of their Complaint that individuals

had deliberately violated their civil rights and performed acts of conspiracy and outrage.

For reasons fully set forth in this brief, the plaintiffs have failed to create a material issue of fact as to every element of their claims, the majority of which are claims of intentional tortious conduct with very specific, detailed requirements, all of which they ignore, now and in the court below. Their negligence claims, as well, lack any authority in law.

The trial court decisions dismissing all claims should be affirmed.

RESPECTFULLY SUBMITTED this 23rd day of December, 2015.

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/s/Amanda Trittin
Amanda Trittin, Legal Assistant

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